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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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PD-0556-20
In the Court of Criminal Appeals of Texas
At Austin

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No. 14-18-00600-CR
In the Court of Appeals
For the Fourteenth District of Texas
At Houston

———♦———

No. 2130699
In County Criminal Court at Law Number Ten
Of Harris County, Texas

———♦———

Phi Van Do
Appellant

v.

The State of Texas
Appellee

———♦———

State's Brief on Discretionary Review

———♦———

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Trial Court:

> **Dan Spjut**, presiding judge

Table of Contents

Index of Authorities

Cases

Statutes

Statement of the Case

The appellant was charged with driving while intoxicated. (CR 8). The information also alleged that an analysis of the appellant's breath showed an alcohol concentration greater than .15. (CR 8). The appellant pleaded not guilty. (2 RR 82-83). Without objection, the trial court instructed the jury only on Class B DWI; they found the appellant guilty of that offense. (CR 93). The trial court found the .15 allegation "true," entered judgement for Class A DWI, and assessed punishment at one year's confinement in the county jail and a $250 fine. (4 RR 4-5; CR 94). The trial court suspended the period of confinement and ordered the appellant to serve one year's community supervision. (CR 94). The trial court certified the appellant's right of appeal and the appellant filed a notice of appeal. (CR 103, 107).

In a published opinion, the Fourteenth Court reversed the conviction for Class A DWI, modified the judgment to show conviction for Class B DWI, and remanded the case for a new punishment hearing. *Do v. State*, ___ S.W.3d ___, No. 14-18-00600-CR, 2020 WL 1619995 (Tex. App.—Houston [14th Dist.] April 2, 2020, pet. granted).

Grounds for Review

1. The Fourteenth Court erred by applying the constitutional harm standard to unobjected-to charge error.

2. Alternatively, the Fourteenth Court erred by concluding that a punishment-phase objection preserved error in the guilt-phase charge.

3. The Fourteenth Court erred by finding reversible harm even though the error concerned an uncontested matter established by objective facts.

Statement of Facts

The appellant rear-ended a car at a stoplight. (2 RR 106-08). An officer noticed the appellant smelled of alcohol and had slurred speech. (2 RR 123-24). The officer took the appellant into the station, where the appellant did poorly on field sobriety tests and blew a .194 on the Intoxylizer. (3 RR 18, 22, 62).

Procedural Background

I. In the Trial Court

A. There was no mention of the .15 element in the guilt phase. The evidence showed a BAC of .194.

Although the appellant was charged with the Class A offense of driving while intoxicated and having an alcohol concentration of .15 or

above, neither at voir dire nor during the guilt phase was there mention of the .15 element. Nor was there mention of the State abandoning the allegation. The prosecutor did not read the allegation as part of the charging instrument at the beginning of trial, and defense counsel did not object to that omission. (2 RR 83-84).

The State's evidence of intoxication was the appellant's performance on the sobriety field tests, and the .194 he blew on the Intoxylizer. (3 RR 18, 22, 62).

The jury charge asked the jury to determine only whether the appellant committed Class B DWI; it did not mention the .15 element, and neither party mentioned this omission to the court. (CR 89-91;). The parties' jury arguments did not mention the .15 element. (*See* 3 RR 78-90).

B. During the punishment phase, the State asked the trial court to make an affirmative finding on the .15 element. The trial court did so, over objection.

At the beginning of the punishment phase the prosecutor said the State "would like to allege—further allege the .15 allegation." (4 RR 4). Defense counsel objected: "[T]hat element was not presented to the jury for their consideration as part of deliberations. We would

object to the enhanced element at this time. They tried it as a loss of use case."[1] (4 RR 5).

The prosecutor replied that the .15 element was "a punishment element. It wasn't a[n] element of the actual offense." (4 RR 5). The trial court overruled the objection, stated it found the enhancement to be true, and assessed punishment at one year in the county jail, suspended for a year. (4 RR 5-6).

II. In the Fourteenth Court

A. The appellant began by arguing the evidence was insufficient, but the State pointed out the error in the case was charge error. In a reply brief, the appellant admitted there was no sufficiency problem but argued the State had abandoned the .15 allegation.

In his original brief the appellant argued that because the trial court handled the .15 element in the punishment phase instead of the guilt phase, the evidence could not support the conviction for Class A DWI. (Appellant's Brief at 43-44). In a separate point the appellant

[1] As one might expect in a case where the evidence included a breath test result of .194, the record does not support defense counsel's assertion that this was "tried … as a loss of use case." The State adduced evidence both that the appellant had lost the use of his normal mental and physical faculties, *and* that he had an alcohol concentration above .08. (*See* 3 RR 84-90 (State's jury argument discussing both kinds of evidence); CR 89 (jury charge: "The State has alleged intoxication by not having the normal use of mental or physical faculties by reason of the introduction of alcohol or by having an alcohol concentration of .08 or more.")).

argued the trial court violated his right, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to have a jury determine every element of the offense. (*Id.* at 46-48). For both points the appellant requested the case be reversed without a harm analysis and remanded for a punishment hearing for Class B DWI.

The State replied that the problem in the case was not evidentiary sufficiency—the evidence showed the appellant's alcohol concentration was greater than .15—but the failure to submit the .15 element to the jury during the guilt phase. (State's Brief at 12-13). The State argued this was "nearly identical" to *Niles v. State*, 555 S.W.3d 562 (Tex. Crim. App. 2018), where this Court held the omission of an aggravating element from the jury charge was error subject to a harmless error analysis.

Relying on a case this Court cited in *Niles*, the State argued the omission of the element was constitutional error. (*Id.* at 13 (citing *People v. Mountjoy*, 431 P.3d 631, 635 (Colo. App. 2016)). The State argued the error here was harmless beyond a reasonable doubt because the evidence showed the jury believed the breath test result. (*Id.* at 13-16).

In a reply brief, the appellant agreed there was no sufficiency problem. (Appellant's Reply Brief at 9-13). But the appellant disagreed with the State's characterization of the problem as charge error. Citing the dissent in *Niles*, the appellant argued the guilt-phase charge was correct because the State had abandoned the .15 allegation by not reading it at the beginning of trial. (*Id.* at 14-18). The appellant argued the trial court's error was in finding the appellant guilty of a Class A offense when the jury convicted him only of a B. (*Id.* at 18-20).

B. Before deciding this case, the Fourteenth Court decided *Niles* on remand. That opinion held the unobjected-to omission of an element from the jury charge is subject to *Almanza*'s "egregious harm" standard.

Four months after the appellant filed his reply brief, the Fourteenth Court issued its opinion on remand in *Niles*. There, a panel with two of the three justices assigned to this case held that if a defendant did not object to the omission of an element from the jury charge the appropriate harm standard was *Almanza*'s egregious-harm standard. *Niles v. State*, 595 S.W.3d 709, 711-12 (Tex. App.—Houston [14th Dist.] 2019, no pet).

Niles filed a motion for en banc reconsideration, arguing that this Court's opinion in the case required an analysis under the standard for constitutional error, not *Almanza*. The Fourteenth Court did not rule on that motion for eight months, finally denying en banc review, by a vote of 5-4, on the same day the opinion here was handed down. *Niles v. State*, ___ S.W.3d ___, No. 14-15-00498-CR, 2020 WL 1617552 (Tex. App.—Houston [14th Dist.] Apr. 2, 2020, no pet.)(ops. of Spain and Bourliot, J.J., dissenting to denial of en banc reconsideration). Of the three justices assigned to this case, the author of the opinion voted for reconsideration, but the other two—including the author of *Niles*—voted against.

C. Here, without addressing whether the appellant objected to the charge error, the Fourteenth Court applied the harm analysis that's appropriate when a defendant objects.

The Fourteenth Court agreed with the State that the problem here was charge error. *Do v. State*, ___ S.W.3d ___, No. 14-18-00600-CR, 2020 WL 1619995 at *4-5 (Tex. App.—Houston [14th Dist.] April 2, 2020, pet. filed). Without describing how the appellant preserved the error, the Fourteenth Court began its harm analysis by describing the standard for constitutional charge error "[w]hen pre-

served." *Id.* at * 5. Based on case law cited by this Court in *Niles*, the Fourteenth Court held that an analysis of preserved constitutional error in a jury charge requires the constitutional-harm standard.

Applying that standard, the Fourteenth Court held the error required reversal because it was possible the jury disbelieved the breath test results and convicted the appellant based on the symptoms of intoxication he showed. *Id.* at *6-8. The Fourteenth Court determined reversal was required because it "[l]ack[ed] knowledge" of which theory of intoxication the jury relied on for conviction.[2]

D. In motions for rehearing and en banc reconsideration, the State pointed out the opinion conflicted with the opinion on remand in *Niles*. Those motions were denied without comment.

The State moved for rehearing, arguing that the opinion conflicted with *Niles*. (State's Motion for Rehearing at 4-5). That is be-

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[2] A reviewing court need not *know* how a jury decided a case to disregard a constitutional error; it need only conclude, beyond a reasonable doubt, the error did not affect the verdict. *See Harrington v. California,* 395 U.S. 250, 254 (1969) (rejecting argument that constitutional harm analysis required knowledge of how error affected actual jurors: "We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury.")

The author of the Fourteenth Court's opinion has elsewhere stated that Rule of Evidence 606—prohibiting inquiry into jury deliberations—makes a "meaningful" harm analysis "impossible." *Stredic v. State*, ___ S.W.3d ___, No. 14-18-00162-CR, 2019 WL 6320220, at *9 (Tex. App.—Houston [14th Dist.] Nov. 26, 2019, no pet. h.)(Spain, J., dissenting on original submission).

cause, like *Niles*, the appellant did not object to the omission of the element, thus, like *Niles*, the court should have applied *Almanza*'s "egregious harm" standard. The State pointed out that the appellant's punishment-phase objection could not be considered an objection to the guilt-phase charge because Article 36.14 requires objections be made before the charge is read to the jury. (*Id.* at 5 (citing TEX. CODE CRIM. PROC. Art. 36.14)). The State argued the error here was not egregiously harmful because the omitted element—whether the breath test results was .15 or greater—was an objective fact established by essentially uncontested evidence. (*Id.* at 8 ("After the jury returned a finding that the appellant was intoxicated, finding that .194 is greater than .15 was a foregone conclusion.")).

After the panel denied the motion, the State moved for en banc reconsideration asking the Fourteenth Court to clarify whether this case or *Niles* was correct. That motion was denied without comment.

First Ground for Review

The Fourteenth Court erred by applying the constitutional harm standard to unobjected-to charge error.

The Fourteenth Court was correct in *Niles* to apply *Almanza*'s "egregious harm" standard to the unpreserved omission of an element

from the jury charge. It erred here by applying the constitutional harm standard to the same unpreserved error.

In Texas there are three types of harm analysis that might apply to error in the jury charge. If there is non-constitutional error and the defendant timely objects, the error will require reversal if it caused "some harm." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). If the error violates the federal constitution and the defendant timely objects, the error will require reversal unless the reviewing court determines, beyond a reasonable doubt, the error did not contribute to the conviction or sentence. *Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2000).

If a defendant did not object, however, the error is subject to a less stringent standard of review that has several names. *Almanza* called this standard "egregious harm"—the conviction will be reversed only if the defendant did not have a "fair and impartial trial." *Almanza*, 686 S.W.2d at 171. If the unobjected-to error in the jury charge was a constitutional error, *Jimenez* explained it was subject to the same standard as "fundamental error"—which *Almanza* explained was the same as the "egregious harm" standard. This is the same standard the federal courts call "plain error review." *Jimenez*, 32 S.W.3d at 238,

n.19; *see Smith v. Texas*, 50 U.S. 297, 317 (2007)(Alito, J., dissenting)(describing *Almanza*'s "egregious harm" standard as "analogous to the federal 'plain error' rule").

Although it was decided before *Apprendi*, *Johnson v. United States*, 520 U.S. 461 (1997) is directly on point. Johnson lied to a grand jury and was tried for perjury. *Johnson*, 520 U.S. at 463-64. Circuit precedent at the time reserved for the trial judge whether the false testimony was material. *Id.* at 464. After the trial but before his appeal, the Supreme Court decided *United States v. Gaudin*, 515 U.S. 506 (1995), holding that the materiality of the false statement was an element of perjury that should be submitted to the jury. *Ibid.*

Johnson raised a *Gaudin* claim on appeal, arguing the trial court erred by not submitting the issue of materiality to the jury. The Supreme Court held that this error, while serious, was not exempt from ordinary preservation requirements. *Id.* at 465. Because Johnson had not objected at trial, the error was subject only to plain-error review. *Id.* at 465-66.

The error here is exactly what happened in *Johnson*—the trial court decided in the punishment phase an element that should have been submitted to the jury in the guilt phase. Just like *Johnson*, the ap-

pellant did not make a timely objection to the failure to submit the element to the jury. Just like *Johnson* and *Niles*, this error is subject to normal preservation requirements and should be reviewed only for egregious harm. The Fourteenth Court erred in applying the constitutional harm standard.

Second Ground for Review

Alternatively, the Fourteenth Court erred by concluding that a punishment-phase objection preserved error in the guilt-phase charge.

The Fourteenth Court did not address whether the appellant preserved his complaint—it just stated the harm standard for a persevered complaint and addressed the harm under that standard. *Do*, 2020 WL 1619995, at *5. While the most direct reading of the opinion is that the Fourteenth Court ignored the question of preservation, it is possible to read this as an implicit holding that the appellant's punishment-phase objection preserved error.

If so, that holding is wrong. As the Fourteenth Court recognized, the error in not submitting an element to the jury in the guilt-phase jury charge is charge error. *See Niles*, 555 S.W.3d at 571-72. By statute, any objection to a jury charge must be made before the charge is read

to the jury. TEX. CODE CRIM. PROC. art. 36.14; *see Almanza*, 686 S.W.2d at171 (requiring "timely" objection to avoid "egregious harm" standard).

The appellant objected at the beginning of the punishment phase to the trial court making the finding. But that was too late to allow the trial court to the error; the jury had been dismissed several days earlier. (3 RR 91).

In *Igo v. State*, 210 S.W.3d 645 (Tex. Crim. App. 2006), this Court held that an objection to the guilt-phase charge raised for the first time in a motion for new trial was subject to the "egregious harm" standard. *Igo*, 210 S.W.3d at 647. This Court noted that one goal behind Article 39.19's two-tiered harm standard is to ensure objections are made at a time when the trial court can fix the error. *Ibid.* From that perspective, objections made at the punishment phase, in a motion for new trial, or for the first time on appeal are all equally untimely—none allow the trial court to fix a problem in the guilt-phase jury charge.

The appellant's objection was a timely objection to the trial court making an affirmative finding on the issue. But what was the trial court supposed to do in response to that objection? If it had sustained

the objection and refused to find the appellant guilty of the charged offense, that would reward the defense for laying behind the log. Finding the appellant guilty of only the Class B would have turned unobjected-to charge error into an acquittal of the Class A offense.

The Fourteenth Court addressed the error in the guilt-phase jury charge, not any punishment-phase error by the trial court. The punishment-phase finding by the trial court should not affect the analysis of guilt-phase charge error.[3] Thus the appellant's objection to the trial court's punishment-phase finding did not preserve the error the Fourteenth Court addressed.

If this Court interprets the Fourteenth Court's opinion as implicitly holding the appellant's punishment-phase objection preserved the guilt-phase error he complained of, this Court should reverse that erroneous holding.

[3] To whatever degree it does, it would point to finding the error does not warrant reversal. The finding of "true" came from the wrong factfinder and may have not applied the correct standard but it's more than what happened in *Niles*, where no one weighed in on the omitted element.

Third Ground for Review

The Fourteenth Court erred by finding reversible harm even though the error concerned an uncontested matter established by objective facts.

Parts of the Fourteenth Court's harm analysis are simply inappropriate. For instance, at one point the court just restated the error. *Do*, 2020 WL 1619995, at *7 (paragraph "consider[ing] what was (or was not) before the jury," noting that .15 element was not submitted to jury).

Another paragraph used the appellant's sentence to assess the harm of the guilt-phase charge error. *Ibid.* ("Finally, we consider appellant's sentence."). The court held that the appellant's sentence—a year in jail suspended for a year—showed the guilt-phase charge was harmful because the punishment exceeded the range for a Class B misdemeanor. But the question was not whether the appellant was harmed by being convicted of a Class A offense, the question was whether he was harmed by not submitting the .15 element to the jury. The appellant's sentence is not relevant for answering that question.

The biggest problem with the Fourteenth Court's harm analysis, though, is that it misunderstood the .15 element for Class A DWI. The overall thrust of the Fourteenth Court's harm analysis is that because

intoxication was a contested issue, and the jury could have made a finding of intoxication based on the appellant's behavior rather than his breath test results, it could not conclude the jury would have found the .15 element beyond a reasonable doubt. *Id.* at *5-7.

While it's true that the appellant contested intoxication, he did not contest that his breath test result was .194. Given the nature of the .15 element, that is not a minor point.

A conviction for driving while intoxicated requires the State to prove actual intoxication when the defendant was operating a motor vehicle—which, in cases of breath or blood tests, can involve questions about retrograde extrapolation, how the test was conducted, and the reliability of the testing device.

But once a jury has found beyond a reasonable doubt that the defendant was intoxicated, all that is required for the .15 element is to show "an analysis of a specimen of the [defendant's] blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed." TEX. PENAL CODE § 49.04(d). The jury need not believe the defendant's alcohol concentration *was* greater than .15; it need only believe the test said it was. *See Ramjattansingh v. State*, 548 S.W.3d 540, 548 (Tex. Crim. App. 2018) (holding that .15

element did not require jury to believe defendant's alcohol concentration was greater than .15 when driving).

It was uncontested that the test result was greater than .15. *Cf. Navarro v. State*, 469 S.W.3d 687, 697 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)(where test of defendant's blood plasma showed alcohol concentration of .158, which State's witness explained meant test showed defendant's blood alcohol concentration was .132, evidence was insufficient to prove .15 element). Defense counsel's arguments that the appellant was not intoxicated while driving did not undercut the objective fact that .194 is greater than .15.

Under any harm standard the error here should not warrant reversal because the error concerned an objective fact proved by uncontested evidence. Once the jury determined the appellant was intoxicated while driving, concluding that .194 is greater than .15 was a foregone conclusion. This Court should reverse the Fourteenth Court's holding that the .15 element is not an objective fact.

Conclusion

The State asks this Court to reverse the Fourteenth Court and remand the case to that court to address the appellant's remaining point.

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